BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIKEL L. WALDIE Claimant	)	
VS.	)	
U.S.D. #260 Respondent	)	Docket Nos. **198,633 & 250,153**
AND	)	
KS. ASSOC. OF SCHOOL BOARDS **LIBERTY MUTUAL INSURANCE CO.** Insurance Carriers	)	

ORDER

Respondent and its insurance carrier, Kansas Association of School Boards, and claimant appeal from Administrative Law Judge John D. Clark's Award dated November 9, 2000. The Board heard oral argument on May 16, 2001.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape. U.S.D. #260 and Kansas Association of School Boards appeared by their attorney, Anton C. Anderson. U.S.D. #260 and Liberty Mutual Insurance Company appeared by their attorney, Michelle Bremwald.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

On November 15, 1999, the claimant filed an Application for Review and Modification of the award in Docket No. 198,633 and an Application for Hearing in Docket

No. 250,153 alleging a series of accidents through the last day worked. The respondent is the same in both dockets but the insurance carrier changed with Liberty Mutual providing coverage after July 1, 1997, and the Kansas Association of School Boards providing coverage before that date. The cases were consolidated for hearing. The Administrative Law Judge determined claimant had not sustained a new accident as alleged in Docket No. 250,153 but his condition had worsened as a natural and probable consequence of the original injury in Docket No. 198,633.

Respondent and its insurance carrier, Kansas Association of School Boards, raised the following issues on review: (1) whether the current injury resulted as a natural and probable consequence of the 1994 accident; (2) whether the Administrative Law Judge erred in assessing all of the award to Docket No. 198,633; (3) the nature and extent of disability; (4) if entitled to a work disability, the determination of wage and task loss components; (5) apportionment between insurance carriers; (6) whether the claimant gave timely notice; and, (7) calculation of the award.

Respondent and its insurance carrier, Liberty Mutual Insurance Company, raised the following issues on review: (1) whether the claimant sustained accidental injury arising out of and in the course of employment anytime from July 1, 1997, through October 8, 1999; (2) whether the claimant gave timely notice during Liberty Mutual's coverage period; (3) average weekly wage; and, (4) nature and extent of claimant's disability.

The claimant raised the following issues on review: (1) whether claimant's current disability is the result of the original injury on August 29, 1994, or a result of the accidental injury occurring in 1999 through the last day worked on October 8, 1999; and, (2) the nature and extent of disability.

FINDINGS OF FACT

Having reviewed the entire evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a custodian for the respondent. On August 29, 1994, the claimant had an onset of back pain which he attributed to using a backpack vacuum cleaner to perform his custodial duties for the respondent.

Dr. Abay provided a course of conservative treatment which did not alleviate the symptoms and on May 31, 1995, claimant underwent a surgical partial laminectomy/ diskectomy at L4-5 on the left. After this first surgery, the claimant started having additional back pain radiating into his right leg. On August 23, 1995, Dr. Abay performed a right L5-S1 partial hemilaminectomy/diskectomy.

On December 18, 1995, claimant was released to return to work with restrictions provided by a functional capacity evaluation (FCE) and adopted by Dr. Abay which placed claimant in the medium physical demand level. The claimant returned to his custodial job with the respondent.

This claim was assigned Docket No. 198,633 and was litigated to an Award dated October 31, 1996. The parties had stipulated claimant had a 19 percent functional impairment. Dr. Schlachter opined claimant had a 25 percent functional impairment and Dr. Abay opined claimant had a 13 percent rating of which 50 percent was preexisting. The Administrative Law Judge determined claimant had sustained accidental injury arising out of and in the course of his employment. The Administrative Law Judge adopted Dr. Abay's testimony that 50 percent of the claimant's impairment was preexisting and awarded claimant compensation based upon a 9.5 percent functional impairment. The respondent requested the Board review this decision, however, it later dismissed its request for review.

After claimant returned to work he began to experience episodes where his leg would give way. On January 27, 1997, the claimant was walking to his car in the parking lot at the school where he worked when his leg gave way and he fell. The claimant had back pain radiating into his right leg. Claimant immediately notified his supervisor of the incident and was referred for treatment with Dr. Abay. The claimant's leg pain progressively worsened and Dr. Abay scheduled an MRI which revealed a recurrent disc herniation at L5-S1 on the right. On July 16, 1997, claimant underwent a surgical widening of laminectomy at L5-S1 and diskectomy with decompression of the S1 nerve root.

In September 1997, the claimant had an incident where his leg gave way and he slipped and fell on some stairs at his sister's house. The claimant noted an increase of back pain. In December 1997, the claimant's leg again gave way while he was exercising on a treadmill during physical therapy and in January 1998, the claimant had several incidents where his leg would give way and he would fall. The claimant had an increase in right sciatic pain.

An MRI of the claimant's spine revealed a large recurrent disk at L5-S1 with impingement of the S1 nerve root. On March 4, 1998, the claimant underwent a surgical laminectomy and medial fasciectomy, diskectomy bilaterally, with decompression of the S1 roots, left diskectomy with BAK titanium cage autograft fusion bilateral. During physical therapy following this surgery the claimant had an incident of pain into his right leg when he lifted some weights from the floor.

The claimant continued to have some right leg pain which would occur when he would stand for prolonged periods of time or bend over to pick up something. A functional capacity evaluation in November 1998 placed the claimant in the light-medium level. The claimant was involved in an automobile accident in January 1999 but did not seek medical

treatment. Dr. Abay's medical notes indicate by May 1999, the claimant was doing fairly well except for some sciatic pain after he walks two or three blocks. In June 1999 the claimant and his father met with Dr. Abay to go over his restrictions provided in the FCE performed in November 1998. The claimant was released to return to work June 16, 1999.

The claimant returned to his job as a custodian for respondent. Because school was out, the claimant eased back into his job. The claimant worked in a group with five or six other custodians and when his back would bother him he was allowed to go sit down. Although claimant noted some back discomfort it was initially not significant. However, when the students returned to school in August, claimant was assigned areas to vacuum, shampoo, dust and clean on his own. The claimant's back pain began to worsen along with pain radiating into his legs. The claimant's back started bothering him to the point he had to have help finishing his assigned jobs.

By October 1999, the claimant was missing some work because of his back and leg and on October 8, 1999, the claimant's supervisor suggested claimant not work until he could return and see Dr. Abay. The claimant could not get an appointment with Dr. Abay until October 21, 1999. At that appointment Dr. Abay noted the custodial duties caused problems and concluded it would be best to take claimant off the custodial work he is unable to perform and that he perform a less physically demanding job. When the claimant provided that information to his supervisor he was advised there were no other jobs available.

The claimant obtained employment at a friend's bowling alley. He worked two days a week and was paid $6 an hour. The job required claimant to sit and watch the pin setter machine and to replace any pins that fell over in the machine. This part-time job lasted approximately a month and a half. The claimant also applied for work at Cessna. Claimant has applied for social security disability.

Claimant testified his pain increases with activity and the more he does the more it hurts. The claimant noted he has good days and bad days and can stay up moving around for five hours some days and eight hours other days. Claimant noted he has bad days about two days a week and he usually lies down to feel better on his bad days. However, the claimant did not believe he could stay up for a complete five-day a week eight-hour a day work week.

Dr. Abay was the treating physician and performed four surgeries on the claimant's back. After the first two surgeries the doctor rated the claimant's permanent partial impairment of function at 13 percent. After the last two surgeries the doctor rated the claimant's permanent partial impairment of function at 22 percent. The doctor opined the claimant's work from June 1999 through October 1999 resulted in a temporary aggravation of his condition. Dr. Abay agreed that throughout his treatment of claimant on each occasion claimant returned to his usual work activities he suffered increased symptoms.

The doctor concluded claimant should be taken off the physically demanding custodial work he could no longer perform. The doctor agreed claimant was better when he had more time to rest and did less physically demanding work. The claimant's own activities better defined what he could and could not do within the restrictions.

The claimant's attorney referred him to Pedro Murati, M.D. for an examination and rating on September 15, 1999. The doctor opined claimant had a 25 percent permanent partial impairment of function. The doctor reexamined claimant on April 17, 2000, and increased his rating to a 27 percent permanent partial impairment of function. Dr. Murati testified the claimant would not be able to work eight-hours a day, five-days a week. Dr. Murati further noted claimant would not be able to stand, sit or walk continuously throughout the day. The doctor noted claimant would need to break it up as much as possible between sitting, standing, and lying down. Following the second examination, the doctor concluded the claimant was essentially and realistically unemployable.

Mr. Jerry Hardin testified as a vocational expert on claimant's behalf. Mr. Hardin saw the claimant on January 31, 2000. Mr. Hardin's initial report dated February 15, 2000, was based upon his meeting with the claimant and the FCE dated November 10, 1998, from Dr. Abay and a medical report dated September 15, 1999, by Dr. Pedro Murati. Mr. Hardin testified claimant was able to earn $7 an hour. Mr. Hardin testified that using Dr. Abay's restrictions Mr. Waldie could find medium level employment. However, when presented the second set of restrictions from Dr. Murati, Mr. Hardin testified that based on those restrictions the claimant was unable to perform or obtain substantial, gainful employment and was permanently and totally disabled.

Conversely, respondent's vocational expert, Ms. Karen Crist Terrill, did not find claimant to be unemployable. Ms. Terrill testified that there are positions available within Mr. Waldie's work restrictions and educational background. Ms. Terrill testified claimant was able to earn $6 an hour with a possibility of fringe benefits and overtime. Ms. Terrill utilized the restrictions imposed on the FCE dated November 10, 1998, and utilized by Dr. Abay. Ms. Terrill did note that claimant probably functions at a fifth or sixth grade educational level. Moreover, Ms. Terrill concluded Dr. Murati's restrictions would place claimant in the sedentary employment level and there would be jobs claimant could perform in that category.

CONCLUSIONS OF LAW

Initially, it must be determined whether claimant sustained additional work-related injuries as alleged in Docket No. 250,153 or whether the claimant's current condition is the result of a natural progression of his original work-related injury in Docket No. 198,633 as determined by the Administrative Law Judge.

At the continuation of regular hearing held on August 1, 2000, respondent and its insurance carrier, Kansas Association of School Boards, agreed any incident that occurred in January 1997 was a direct and natural result of the original injury and would be covered under the Award in Docket No. 198,663.

Once an employee suffers a compensable injury, "subsequent progression of that condition remains compensable under the Kansas Workers Compensation Act so long as the worsening is not shown to have been produced by an independent nonindustrial cause." *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 3, 952 P.2d 411 (1997).

Accordingly, it is the contention of the claimant and respondent and its insurance carrier, Kansas Association of School Boards, that when claimant returned to work in June 1999 he suffered a series of accidents that permanently aggravated his preexisting condition. The allegation that claimant sustained a new injury is premised upon the contentions that when claimant returned to work he was asymptomatic and that claimant's symptoms worsened and his permanent impairment increased after his return to work from June through October 1999.

After the original injury in 1994, the claimant has continuously had problems with his legs giving way when he engaged in activity. Dr. Abay testified there were documented instances where claimant's left and right extremities have given out throughout the course of Dr. Abay's treatment. The claimant noted the pain in his legs and lower back has remained the same since 1994.

Although it is argued by respondent and its insurance carrier, Kansas Association of School Boards, that by June 1999 the claimant had no pain radiating into his legs, Dr. Abay's contemporaneous medical records refute this contention. After claimant's last surgery in March 1998 and prior to his attempted return to work in June 1999, the claimant had numerous reported episodes of leg pain which were frequently associated with increased physical activity. Although claimant's condition had improved it cannot be stated he was asymptomatic when he attempted to return to work in June 1999.

It must be noted that claimant had been off work and had two back surgeries in the approximate two-year interim before he attempted to return to work. When claimant attempted to return to work in June 1999 he admittedly eased back into work, worked with a group of other custodians and was allowed to rest as needed. When school started in August and claimant was required to perform his custodial duties alone, his pain increased and he needed others to help him complete his job duties. The claimant simply was never able to fully return to his former custodial duties.

Claimant and respondent and its insurance carrier, Kansas Association of School Boards, argue claimant was able to perform his job duties from June until August without difficulty or pain, however, an examination of the testimony and medical records reveal

claimant was accommodated and had not returned to his full duties until school started in August. Thereafter, when he was required to perform his custodial duties alone he was simply unable to do the job. He missed work and had to have others help him complete his job duties. It is not as if he was able to do the work and then sustained an injury that rendered him unable to perform his job duties.

It is next argued by claimant and respondent and its insurance carrier, Kansas Association of School Boards, that claimant's condition permanently worsened because Dr. Murati increased claimant's permanent impairment rating from 25 percent to 27 percent. It must be noted that when Dr. Murati first examined claimant on September 15, 1999, the claimant was attempting his return to his custodial job duties. After that examination the doctor opined claimant had sustained a 25 percent permanent partial impairment of function. When Dr. Murati next examined claimant on April 17, 2000, he increased claimant's rating to a 27 percent permanent partial impairment of function. Again, it must be noted that after Dr. Murati's first examination the claimant only worked for respondent until October 8, 1999, and even then was missing work days. Attributing the increase in rating to the time claimant worked between September 15, 1999, and his last day at work on October 8, 1999, is suspect as by that time claimant testified he was again having assistance completing his job duties. Rather than indicating a worsening attributable to work, Dr. Murati's increase supports a finding that claimant's condition had and continued to gradually worsen even after he was no longer engaging in strenuous physical activity.

In addition, Dr. Abay concluded claimant's return to work from June through October 1999 had only resulted in a return of symptoms that always followed claimant's increased physical activity but did not result in a permanent increase or aggravation of his condition.

In conclusion, the evidence indicates that every time claimant attempted to increase his physical activity he reported episodes of worsening pain complaints. Accordingly, the Board affirms the Administrative Law Judge's finding that claimant's condition is the result of the natural progression of his condition related to his accident of August 29, 1994.

The next issue is the nature and extent of claimant's disability. The Administrative Law Judge concluded claimant's condition had worsened and he was entitled to a work disability. Respondent and its insurance carrier, Kansas Association of School Boards, argue the Administrative Law Judge erred in the determination of claimant's task and wage loss components of his work disability. Conversely, the claimant argues the evidence supports a finding of permanent total disability or in the alternative a higher work disability.

Finding claimant had a 73.5 percent wage loss and a 46 percent task loss, the Administrative Law Judge concluded claimant had sustained a 60 percent work disability. The Judge based the wage loss component on the $96 average weekly wage claimant

received at a part-time job earning $6 per hour for 16 hours a week. The job was temporary and only lasted a few weeks. Such a part-time job is not substantial gainful employment and is an inappropriate measure therefor upon which to base the claimant's capacity to earn a wage for the wage loss prong of the work disability formula. For claimant to have a work disability, he should be able to work full-time, or close to full-time, at substantial gainful employment. If 16 hours per week is all claimant has the ability to work, then he is realistically unemployable.

After claimant had unsuccessfully attempted to return to work, Dr. Abay did not specifically change claimant's restrictions, however, the doctor did specifically determine claimant should be removed from his custodial duties. The doctor noted that claimant's attempts at physical activity could better define what he could and could not do. Dr. Murati concluded claimant was in the sedentary work level but he would need to frequently change from standing, walking and sitting positions with periods of lying down which in effect rendered the claimant realistically unemployable.

The claimant's uncontradicted testimony was he did not feel he could perform a full 5 day, 40-hour work week because he would have bad days that required him to seek relief by lying down. Claimant admitted he had a learning disability that had placed him in special education classes throughout his schooling. Ms. Terrill confirmed claimant functioned on the fifth or sixth grade level.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[3]

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

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[1]K.S.A. 44-501(a) (Furse 1993).

[2]K.S.A. 44-508(g) (Furse 1993).

[3]*Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 (1991).

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[4]

In *Wardlow v. ANR Freight Systems, Inc.*, 19 Kan. App.2d 110, 113 (1993), the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this case after the initial injury the claimant has had four surgeries to his low back. After each surgery, the claimant has experienced continued worsening pain, including pain and weakness in his legs, with increased physical activity. The claimant testified that with the onset of pain on bad days he must change body positions and seek relief by lying down. The claimant is learning disabled and according to Ms. Terrill, the vocational expert, functions on a fifth or sixth grade level. Mr. Hardin concluded that with Dr. Murati's restrictions the claimant was realistically unemployable. Although it is argued that Dr. Abay's continued reliance on the restrictions imposed in the November 10, 1998, FCE indicates claimant is employable, a review of the doctor's testimony establishes that those restrictions were merely guides and claimant's attempts at physical activity would establish what he could and could not do.

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[4] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In conclusion, based upon the record as a whole including the need for ongoing treatment, numerous surgeries, Dr. Murati's findings, Mr. Hardin's vocational opinion utilizing the doctor's reports, the limited physical activities the claimant can perform, the claimant's lack of education and training, his past history of physical labor jobs and his testimony that increased activity results in increased debilitating pain, it is the Board's determination the claimant has met his burden of proof to establish that he is essentially and realistically unemployable.

Because it is the Board's finding that claimant's condition is the result of the natural progression of his August 29, 1994 work-related injury, the claimant's average weekly wage is the stipulated amount of $362.09.[5] The remaining issues regarding average weekly wage, notice and calculation of the award are rendered moot by the foregoing findings.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge John D. Clark dated November 9, 2000, is affirmed that claimant's condition is the natural and probable consequence of the accident of August 29, 1994, in Docket No. 198,633 and modified to reflect that claimant is permanently and totally disabled.

The claimant is entitled to 190.15 weeks temporary total disability at the rate of $241.41 per week or $45,904.11 followed by 34.71 weeks at the rate of $241.41 per week or $8,379.34 for a 9.5 percent functional whole body disability, followed by permanent total compensation at the rate of $241.41 per week in the sum of $70,716.55 for a permanent total disability, making a total award of $125,000.

As of October 31, 2001, there would be due and owing to the claimant 190.15 weeks of temporary total compensation at the rate of $241.41 per week in the sum of $45,904.11 plus 34.71 weeks of permanent partial compensation at $241.41 per week in the sum of $8,379.34, plus 107.71 weeks of permanent total compensation at $241.41 per week in the sum of $26,002.27, for a total due and owing of $80,285.72, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $44,714.28 shall be paid at $241.41 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

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[5]Deposition of Mary Ann Haga, September 18, 2000; p. 10.

Dated this 31st day of October 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority in the above matter. The majority found claimant to be permanently and totally disabled citing *Wardlow v. ANR Freight Systems, Inc.*, 19 Kan. App.2d 110, 72 P.2d 299 (1993). In *Wardlow* the Kansas Court of Appeals considered the claimant's request for permanent total disability. K.S.A. 44-510c(a)(2) defines permanent total disability as existing when "the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

Wardlow held that permanent total disability existed when a claimant proves that he is "essentially unemployable."

Here, respondent's vocational expert, Karen Terrill, found claimant capable of earning $6 an hour with a possibility of fringe benefits and overtime in the open labor market. Based upon the restrictions of Dr. Abay, claimant's vocational expert, Mr. Jerry Hardin, testified claimant was capable of earning $7 an hour and finding work in the medium level of employment. Only when presented with the restrictions from claimant's hired expert, Dr. Murati, did Mr. Hardin testify the claimant was unable to perform substantial and gainful employment.

The language of K.S.A. 44-510c is specific in that a claimant must be rendered completely and permanently incapable of engaging in any type of substantial and gainful employment in order to be deemed permanently totally disabled. *Wardlow* diluted the

language of the statute to a certain degree. This case dilutes the standard of *Wardlow* even further.

This Board member would not find claimant to be permanently and totally disabled but instead would award claimant a work disability based upon a 29 percent wage loss imputing a $6.50 per hour wage at 40 hours per week as a split between Ms. Terrill's and Mr. Hardin's opinions. Additionally, this Board member would find claimant had suffered a task loss of 67 percent. When utilizing the standard of K.S.A. 44-510c and combining the two elements of work disability, claimant should be awarded a 48 percent permanent partial disability to the body as a whole as a work disability.

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BOARD MEMBER

I concur with the above dissent in that the record taken as a whole fails to prove a permanent total disability.

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier, Kansas Association of School Boards
Michelle Bremwald, Attorney for Respondent and its Insurance Carrier, Liberty Mutual Insurance Co.
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director